IN THE

Supreme Court of the United States

October Term, 1976.

No. 76-1088.

FEDERAL TRADE COMMISSION,

Petitioner,

v.

BENEFICIAL CORPORATION AND BENEFICIAL MANAGEMENT CORPORATION,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit.

BRIEF OF RESPONDENTS IN OPPOSITION.

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OPINIONS BELOW.

The opinion of the Court of Appeals, attached to the Petition for a writ of Certiorari (the "Petition") as Appendix A (A1a-30a),[1] is reported at 542 F. 2d 611 (3d Cir. 1976). Leave to file an untimely petition for reargument was denied on November 19, 1976. The decision (A35a-140a) and order (A141a-145a) of the Federal Trade Commission (the "Commission") are reported at 86 F. T. C. 119.

1. All references herein to an appendix ("A-") are references to the appendices to the Petition.

JURISDICTION.

The statement of jurisdiction set forth in the Petition is adequate.

QUESTIONS PRESENTED.

1. Whether or not the Court should grant the Petition to review a judgment of the Court of Appeals which judgment is not final because that part of the Commission's order which was not affirmed was remanded to the Commission for further proceedings.

2. Whether or not the decision of the Court of Appeals should be reviewed by this Court where the Court below applied established precedent in requiring the Commission to consider the feasibility of explanatory material in lieu of an order requiring total excision of the phrase, "instant tax refund" and other "words of similar import."

STATUTE INVOLVED.

Section 5(a) and (b) of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U. S. C. 45(a) and (b), are reproduced at page 3 of the Petition.

STATEMENT.

The portion of this litigation which is sought to be reviewed involves the advertising by Beneficial [2] of its personal loan services to the public during that portion of the year when federal income tax returns are prepared and filed with the government.

Beneficial, since its inception, has been in the business of making loans through its loan office subsidiaries to members of the public based upon the credit-worthiness of the applicants (A77a-78a).

Commencing in the spring of 1969 Beneficial developed and implemented a program of preparing income tax returns in its loan offices (A89a; 100a). Beneficial entered the field of preparing income tax returns beginning in the 1970 tax season.

The initial decision to enter this field was based on the belief that those who visited loan offices to have their income tax returns prepared and who desired or needed funds to pay taxes would find it convenient to borrow such funds from Beneficial (A100a). Since most taxpayers receive refunds from the government, Beneficial decided to advertise a loan providing the immediate use of the money to anticipate a tax refund and to eliminate the need to await a check from the government. Since the inception of the program, Beneficial's copyrighted advertising theme has centered around the "instant tax refund" loan (A91a).

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2. Respondent Beneficial Corporation is a holding company (A77a-78a). Approximately 1,500 small loan offices of the Beneficial Finance System are operated in the United States by wholly-owned subsidiaries of Beneficial Corporation (A78a-80a). Respondent Beneficial Management Corporation is a wholly-owned subsidiary of Beneficial Corporation and provides services to the operating subsidiaries (A79a). Respondents will be referred to in this brief as "Beneficial".

Beneficial has continually and voluntarily re-evaluated, modified and changed its advertising to clarify adequately the instant tax refund loan concept, such steps having been taken prior to the institution of the present action by the Commission (see, A89a-97a).[3]

The Commission commenced the present action with the filing of an administrative complaint against Beneficial on April 10, 1973. Beneficial did not dispute the fact that the instant tax refund loan is part of Beneficial's usual loan service based on the credit-worthiness of the borrower. In this respect, the loan is like other loans normally advertised in the industry, such as a "pay day loan", "vacation loan", "billpayer loan" or the like. These advertised loans, like the "instant tax refund" loan, are not deceptive when the prospective borrower is informed of a purpose for which he may wish or need to borrow. Here the purpose is to permit a borrower to anticipate a refund.

The Administrative Law Judge, without considering whether a remedy less drastic than excision would provide adequate protection to the public, concluded that excision of the phrase must be ordered (A133a). In so ruling, he reasoned that since Beneficial's past use of the "instant tax refund" loan advertising had been misleading, and its past attempts at qualification of the language found to have been wanting, then, *a priori*, any future use of the language was prohibited (see, A132a-134a; compare, A110a-112a [finding that Beneficial's past attempts to qualify the language had not been effective]). Moreover, he injected into his conclusion the theory that excision had a

3. The Commission quotes Beneficial's earliest form of advertising in its Petition (Petition, pp. 3-4). However, the relevance of such advertising, putting aside the fact that this form of advertising was used for only a brief period of time as a pilot program, is questionable in view of the Commission's duty to consider, as an alternative to excising the "instant tax refund" loan language, possible future methods of qualifying that language.

punitive and purgative effect, and was thus justified on that basis as well (A133a). He ordered Beneficial to cease and desist from using the term "instant tax refund" or "any other word or words of similar import or meaning" (A137a).

In affirming the decision of the Administration Law Judge, the Commission gave equally perfunctory consideration to remedies less drastic than excision. The Commission adopted the Administrative Law Judge's theory that Beneficial's past unsuccessful efforts at qualifying the term had prejudiced any future attempts at qualification (A36a). The Commission refused to consider seriously a remedy less drastic than excision. Thus, the Commission refused to follow the rule established by this Court in *Federal Trade Commission v. Royal Milling Company*, 288 U. S. 212 (1933), *Jacob Siegel Co. v. Federal Trade Commission*, 327 U. S. 608 (1946) and related cases. As to these authorities, the Commission stated:

> "Though we believe the *Royal Milling* line of cases is compatible with our normal responsibility to enter effective but not overbroad orders, to the extent it may actually be a limitation or exception to the Commission's authority to devise fully effective remedies, then we decline to expand the exception from trade names to advertising slogans. The Instant Tax Refund slogan is unlike the established company names in *Royal Milling*, for it is not the name of anything. It is an empty promotional phrase referring to nothing." (A54a).

The Court of Appeals remanded this cause to the Commission to consider whether a remedy less drastic than excision would provide adequate protection to the public (A33a). The basis for the remand was not, as the Com-

mission suggests, the adoption by the Court of Appeals of a new standard of judicial review (see, Petition, pp. 8-9). Rather, the Court based its decision on three distinct grounds. The Court concluded that the Commission exceeded its statutory authority under Section 5 as enunciated by this Court in *Jacob Siegel* and *Royal Milling* line of cases, in failing fully to consider rewritten advertising copy in lieu of excision (A19a).

Also the Court rejected the limiting construction which the Commission placed on *Jacob Siegel* and *Royal Milling* (A20a).[4] Finally the Court stated that ". . . the remedy for the perceived violation can go no further in imposing a prior restraint on protected commercial speech than is reasonably necessary to accomplish the remedial objective of preventing the violation." (A17a-18a).

4. *Jacob Siegel Co. v. Federal Trade Commission*, 327 U. S. 608 (1946) and *Federal Trade Commission v. Royal Milling Co.*, 288 U. S. 212 (1933).

ARGUMENT.

I. The Issues Raised by the Petition Are Not Ripe for Decision.

The judgment of the Court of Appeals remands the cause to the Commission for thorough consideration of alternative remedies. Until this litigation has been terminated by a final order, review by this Court is premature. It is respectfully submitted that the Court in its discretion (*Wade v. Mayo*, 334 U. S. 672, 680 (1948) and Supreme Court Rule 19) should deny the Petition.

Although the Commission claims the contrary, the Court of Appeals has not held that excision may not be a proper remedy in appropriate cases; nor has it entered an order imposing any specific remedy on remand. It has merely remanded for full consideration of alternative remedies.

On remand, respondents expect the Commission, after full consideration, to agree that explanatory language can cure the alleged deception.[5] If the Commission so concludes, the proceeding will be ended by amended order of the Commission. The issue which the Commission seeks to have this Court review at this interlocutory stage will thus become moot. If the Commission does not so agree, the Court of Appeals will have jurisdiction to review the action of the Commission.

The Commission has lost sight of the fact that the basis for the Court of Appeals' decision was its conclusion that the Commission failed ". . . to consider fully the feasibility of requiring merely that advertising copy be rewrit-

5. While we do not concede that Beneficial's earlier advertising was deceptive, we do not seek review of that part of the judgment of the Court of Appeals which affirms the Commission's finding to that effect.

ten in lieu of total excision of the offending language . . ." (A19a, 542 F. 2d at 619). This is not a case where the Court of Appeals has invaded the primary jurisdiction of the Commission; it is not a case where the Court of Appeals has reversed the considered and thorough findings of an administrative agency. The limited scope of the Court of Appeals' decision is apparent from these excerpts:

> ". . . We do not believe that the Commission's conclusion as to the capacity of qualifying language to apprise Beneficial's audience of the true nature of the offered services can be sustained . . . .
>
> "It is now established beyond dispute that there is no commercial speech exception to the first amendment. . . . That does not mean that an advertiser may engage in speech that is an essential part of a scheme to violate an otherwise valid law. . . .
>
> "Even before the demise of *Valentine v. Chrestensen*, 346 U. S. 52 (1942), was heralded in *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc., supra*, and *Bigelow v. Virginia, supra*, the Supreme Court held that the Federal Trade Commission abused its discretion in ordering the excision from advertising of a valuable business asset like a trade name without considering whether modification of the message could eliminate the objectionable portion. *Jacob Siegel Co. v. FTC*, 327 U. S. 608 (1946); *FTC v. Royal Milling Co.*, 288 U. S. 212 (1933). . . .
>
> "In failing to consider fully the feasibility of requiring merely that advertising copy be written in lieu of total excision of the offending language, the Commission would appear to have exceeded its remedial

> authority under § 5 as shaped by the *Jacob Siegel-Royal Milling* line of cases. . . . We reject to limiting construction that the Commission attaches to *Royal Milling*. . . .
>
> "The Commission, like any governmental agency, must start from the premise that any prior restraint is suspect, and that a remedy, even for deceptive advertising, can go no further than is necessary for the elimination of a deception. The Commission's order proscribing use of the term instant tax refund or any other word or words of similar import or meaning, without consideration of the context in which the words appear, went further than was permitted for that purpose and was an abuse of the Commission's remedial discretion. It cannot in that form and without such consideration be affirmed or enforced. . . ." (A17a-21a).

The Court has observed that the absence of a final decision is, in and of itself, a sufficient reason for the denial of a petition for a writ of certiorari. *Hamilton Shoe Co. v. Wolf Bros.*, 240 U. S. 251 (1916). In *Brotherhood of Locomotive Firemen and Enginemen v. Bangor & Aroostook Railroad Co.*, 389 U. S. 327 (1967), a petition for a writ of certiorari was denied where, as here, the petitioner sought review of a non-final judgment remanding a cause for further consideration of certain factual issues relating to the question of remedy. In denying the petition, the Court observed:

> "Petitioners seek certiorari to review the adverse rulings made by the Court of Appeals. However, because the Court of Appeals remanded the case, it is not yet ripe for review by this Court. The petition for writ of certiorari is denied." 389 U. S. at 328.

The Commission, however, argues that it "explicitly considered whether something less than elimination of the deceptive phrase would suffice to protect the public, but justifiably concluded that any lesser remedy would be inadequate." (Pet., p. 11). This argument is without support. Rather than carefully considering whether an alternative remedy would suffice, the Commission concluded, without discussion of any specific alternative remedies and without any consideration of any evidence relevant thereto, that the phrase "instant tax refund" when used with any form of qualification is inherently deceptive (A54a-55a). The Commission did not even attempt to rest its order on its assessment of the possibility of adequate qualifying language. The Court of Appeals was well within established principles of law when it remanded the question of remedy for further consideration. See, *Federal Trade Commission v. Sperry & Hutchinson Co.*, 405 U. S. 233, 248 (1972).

The cases cited by the Commission do not suggest a contrary result (Pet., p. 11). Beneficial will not burden the Court with an analysis of each specific case. Each of those cases is plainly distinguishable from the present case in that in each the Commission had considered remedies alternative to excision and had exercised its discretion in choosing an appropriate remedy. The record in the present case is barren of any evidence that alternative remedies were fully considered. For example, in *Carter Products, Inc. v. Federal Trade Commission*, 268 F. 2d 461 (9th Cir. 1959) cert. denied 361 U. S. 884 (1959), rehearing denied 361 U. S. 921 (1959) (Pet., p. 11), the Commission conducted in excess of 149 hearings, presented the Court of Appeals with voluminous evidence regarding its conclusions and carefully related the evidence to its conclusions in specific and careful findings of fact. In the present case the

Commission concluded without one shred of evidentiary support that the phrase "instant tax refund" could not be qualified and must be excised. Indeed, had the Court of Appeals affirmed the Commission on that basis, it would have acted in complete disregard of its statutory duty of supervision as established by *Jacob Siegel* and *Royal Milling*.[6]

II. The Decision Below Does Not Conflict With Decisions of This Court or Other Courts of Appeal; Nor Does It Present Significant Issues for Review.

The Commission ignores the provisions of Rule 19 (1)(b), which indicate the reasons for which a writ of certiorari will ordinarily be granted. None of the reasons fits the instant case. The decision below is simply an application of the principles governing the Commission for 44 years since the decision of this Court in *Federal Trade Commission v. Royal Milling Co.*, 288 U. S. 212 (1933). Since *Royal Milling*, it has been well settled that "orders [of the Commission] should go no further than is reasonably necessary to correct the evil and preserve the rights of competitors and public". *Id.*, at 217. The decision below does not conflict with any decisions of this Court nor with any decisions of any other courts of appeal.

The Commission argues that the Court of Appeals should have abdicated its responsibilities in reviewing decisions of the Commission and should have deferred totally to the Commission despite the fact that the Court found that the Commission had erred (Pet. pp. 9-13). The Commission relies heavily on statements of this Court in *Federal Trade Commission v. Royal Milling Co.* and *Jacob Siegel*

6. *Jacob Siegel Co. v. Federal Trade Commission*, 327 U. S. 608 (1946) and *Federal Trade Commission v. Royal Milling Co.*, 288 U. S. 212 (1933).

v. Federal Trade Commission (Pet., pp. 10, 13).[7] However, both *Siegel* and *Royal Milling* enunciate the very reasons why the Petition should not be granted.

In *Royal Milling*, the Commission concluded that the respondents' tradenames, including the words "milling company", were deceptive in conveying the erroneous impression that the respondents were grinders, and held that the words "milling company" should be excised. This Court held that the tradenames were valuable business assets, the destruction of which would probably be highly injurious, and that excision should not be ordered if less drastic means would accomplish the same result. Although it did not disagree with the Commission's finding that "milling company" implied "grinder", the Court held that the qualifying language (*e.g.*, "Not Grinders of Wheat") used in immediate connection with the names would be sufficient to eliminate the deception. Applying this Court's mandated reasoning to the instant case requires that the instant tax refund loan advertising be permitted to continue with the addition of appropriate qualifying language. This has been done in decisions applying *Royal Milling*.

In *Jacob Siegel v. Federal Trade Commission*, 327 U. S. 608 (1946), the Court held that its earlier decision in *Royal Milling* continued to be controlling law and that a valuable business asset, such as a tradename, should be ordered excised only if less drastic means would not achieve the desired end. In that case, the tradename

7. The Commission's reliance on these decisions is somewhat curious since it also argues that the principles enunciated in *Royal Milling* (and, by necessity, *Siegel*) are not binding on the Commission (Pet. pp. 13-14, *n.* 10) when the Commission is reviewing advertising rather than tradenames as were involved in *Royal Milling* and *Siegel*. The Commission does not explain why it urges this Court to reverse the decision below based on these decisions and, at the same time, urges this Court to determine that these decisions are not binding on the Commission when it reviews advertising. The Commission cannot have it both ways.

"Alpacuna" was found by the Commission to be deceptive when applied to a fabric which contained no vicuna fleece. This Court remanded for consideration of the addition of qualifying language in lieu of excision. Upon remand, the Commission modified its order to allow use of "Alpacuna", provided that the constituent materials and fibres thereof were listed immediately following the name. *Jacob Siegel*, 43 F. T. C. 256, 259-60 (1946).

Many courts of appeal have recently applied this principle. In *Korber Hats, Inc. v. FTC*, 311 F. 2d 358 (1st Cir. 1962), the Court set aside a Commission order which prohibited a manufacturer of men's hats from using the word "Milan" on its labels because it implied that the hats were manufactured in Italy. The Court remanded "for a determination of whether an absolute proscription against the use of any variation of the term 'Milan' is required . . .". 311 F. 2d at 363. The Court held that if qualifying language on the label would eliminate any likely deception, then use of the word "Milan" with such qualifying language should be permitted. *Id.*

Similarly, in *Magnaflo Corporation v. FTC*, 343 F. 2d 318 (D. C. Cir. 1965), the Court remanded a Commission order for a determination of the proper remedy for deceptive advertising practices:

> "The Commission must give careful consideration to the possibility of qualification before concluding that no change short of excision of a trade name will protect the public adequately under the Act [citation omitted]. Where the complete destruction of a substantial private interest is at issue, ordinary fairness requires such care." 343 F. 2d at 320.

This principle has been applied by every court of appeals to consider the question. See, *e.g.*, *Regina Corporation v. Federal Trade Commission*, 322 F. 2d 765 (3d

Cir. 1963); *Elliott Knitwear, Inc. v. Federal Trade Commission*, 266 F. 2d 787 (2d Cir. 1959); *Alberty v. Federal Trade Commission*, 182 F. 2d 36 (D. C. Cir. 1950), *cert. denied*, 340 U. S. 818 (1950); *Marco Sales Co. v. Federal Trade Commission*, 453 F. 2d 1 (2nd Cir. 1971); *Parker Pen Co. v. Federal Trade Commission*, 159 F. 2d 509 (7th Cir. 1946); *Federal Trade Commission v. Good-Grape Co.*, 45 F. 2d 70 (6th Cir. 1930); *Federal Trade Commission v. Cassoff*, 38 F. 2d 790 (2d Cir. 1930); *N. Fluegelman & Co. v. Federal Trade Commission*, 37 F. 2d 59 (2d Cir. 1930).

Jacob Siegel has also been applied in other instances where courts of appeals have modified orders which the Commission had issued in connection with advertising claims or advertising language. See, *Grove Laboratories v. Federal Trade Commission*, 418 F. 2d 489 (5th Cir. 1969) [advertising claim]; *Carter Products, Inc. v. Federal Trade Commission*, 186 F. 2d 821 (7th Cir. 1951) [advertising claim]; *Alberty v. Federal Trade Commission*, 182 F. 2d 36 (D. C. Cir. 1950), *cert. denied*, 340 U. S. 818 (1950) [striking a Commission order requiring the addition of derogatory language to certain advertising]; *D. D. D. Corp. v. Federal Trade Commission*, 125 F. 2d 679 (7th Cir. 1942) [the Commission cannot require that an advertiser use the word "temporary" in connection with the relief that his product would supply]. This Court also recognized the applicability of *Royal Milling* and *Jacob Siegel* to advertising in *Federal Trade Commission v. Colgate-Palmolive Co.*, 380 U. S. 374 (1965).

The Commission's argument also ignores the fact that both the Administrative Procedure Act (5 U. S. C. § 706 (2)(A), (B) and (C)) and the Federal Trade Commission Act (15 U. S. C. § 45(c)) mandate the approach taken by the Court of Appeals in this case. This Court has stated:

> "Congress has imposed on [courts of appeal] responsibility for assuring that the [Commission] keeps within reasonable grounds. That responsibility is not less real because it is limited to enforcing the requirement that evidence appear substantial when viewed, on the record as a whole, by courts invested with the authority and enjoying the prestige of the Court of Appeals." *Universal Camera Corporation v. National Labor Relations Board*, 340 U. S. 474, 490 (1951).

See, *Burlington Truck Lines, Inc. v. United States*, 371 U. S. 156, 167 (1962); *Gilbertville Trucking Co. v. United States*, 371 U. S. 115, 130-31 (1962).

Thus, the Court of Appeals did nothing more than follow established precedent and law in determining that the matter should be remanded to the Commission for a thorough and full investigation of remedies less drastic than total excision. Judge Friendly put the matter quite well in discussing the remand by federal courts of appeal to administrative agencies for consideration of difficult questions which are inadequately analyzed: "Have you given enough thought to your choice? Are you entirely sure the evil calls for . . . the drastic [remedy] you have chosen?" (Page 209.) "Conceivably, the Board will take the hint and rethink the basis of its decision; if not, the court will at least have the benefit of an explicated decision." Henry J. Friendly, "*Chenery* Revisited: Reflections on Reversal and Remand of Administrative Orders", 1969 *Duke L. J.* 199 at 208.

The second basis for the Petition is equally lacking in merit. The Commission argues (Pet. pp. 14-16) that the decision of the Court of Appeals did not proceed in accordance with the appropriate standards of review. The Commission also attempts to create the erroneous impression that the Court of Appeals held that the First Amend-

ment to the United States Constitution prohibits the Commission from regulating and prohibiting deceptive and untrue commercial speech (Pet. pp. 15-16). Clearly, Judge Gibbons did not so hold.

The Court of Appeals noted that this Court's decisions in *Bigelow v. Virginia*, 421 U. S. 809 (1975), and *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748 (1976), determined that commercial speech is entitled to First Amendment protection. However, the Court of Appeals noted that First Amendment protection does not permit an advertiser to violate an otherwise valid law (A18a).

Thus while the First Amendment was mentioned, the decision of the Court of Appeals was based upon an application of the time-honored *Jacob Siegel-Royal Milling* doctrine that the Commission can go no further than is reasonably necessary in its remedial decrees. This Court's decisions in *Bigelow* and *Virginia State Board* were merely referred to by the Court of Appeals as supportive of that doctrine when applied to commercial advertising. The First Amendment requires nothing more than that governmental agencies use reasonable care in issuing prior restraints. There is nothing new in this statement.

The views expressed herein by appellate counsel for the Commission with respect to the constitutional protection of advertising is contrary to the present view held by the Commission. The Commission's traditional view of the First Amendment was clearly stated in *Firestone Tire & Rubber Co.*, 81 F. T. C. 398, 472 (1972): "the First Amendment does not protect purely commercial advertising . . .". Thus it is not surprising that the Commission disposed of Beneficial's constitutional arguments in a footnote (A55a-56a). The Court of Appeals has remanded this action for a full consideration of whether alternative

remedies to excision are available since the Commission did not give any recognition to Beneficial's First Amendment arguments raised before the Commission.

Presumably on remand, the Commission will apply its current view of advertising and the First Amendment. That view seems now to be expressed in its recent opinion in *National Commission on Egg Nutrition*, – F. T. C. –, BNA, Anti-Trust & Trade Reg. Repts., 8-10-76, E-1, at E-9, where the Commission acknowledged that "the Supreme Court dispelled what doubts may have lingered that speech does not lose all constitutional protection merely because it is designed to offer something for sale . . .". The Commission further recognized (contrary to what it is asserting in the Petition at note 10, pp. 13-14), that there is "enormous public interest" in the "vigorous dissemination" of product information. The Commission gave careful consideration to the Constitutional arguments raised, contrary to its summary disposition in this case.[8] Thus, not only is the decision of the Court below in conformity with the decisions of this Court and other courts of appeals, it is in complete conformity with the most recent decisions of the Commission itself.[9]

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8. The decision by the Commission in *National Commission on Egg Nutrition* predated by approximately one month the decision of the Court below.

9. See also, the very recent opinion of Circuit Judge Butzner writing for the three-Judge District Court in *Health Systems Agency of N. Virginia v. Virginia State Bd. of Medicine*, 424 F. Supp. 267, 273 (E. D. Va. 1976), which struck down a restraint on medical advertising: "Undoubtedly, the state has a substantial interest in preventing the fraudulent or deceptive practice of medicine. . . . Nevertheless, the state cannot achieve its goals by unnecessarily broad encroachments on first amendment rights." And see, *Fur Information & Fash. Coun., Inc. v. E. F. Timme & Son, Inc.*, 364 F. Supp. 16, 22 (S. D. N. Y. 1973): "Even advertisers enjoy first amendments rights, . . . While Congress may limit such rights to prevent fraud, . . . such limitation must be drawn narrowly, so as to meet the perceived evil, without unnecessary impingement on the right of free speech."

Nonetheless, whatever is the ultimate scope of protection to be afforded commercial advertising, it is plain that, at a minimum, the First Amendment must assure that the right to communicate is not needlessly obstructed through careless failure adequately to weigh less drastic alternative remedies. This is nothing but a requirement of ordinary care and fairness; if the law required anything less, and unless the decision of the Court in *Virginia State Board of Pharmacy* is meaningless, commercial speech would enjoy no meaningful protection. Therefore, at a minimum the First Amendment requires that prior restraints on commercial expression be narrowly drawn and based upon a careful examination of less restrictive alternatives. Why should the Commission resist such manifestly fair and equitable ground rules in this case? Its approach is particularly baffling since such rules are required by the *Jacob Siegel* and *Royal Milling*[10] cases and by the standards applied by the Commission itself.

Finally, the Commission argues that the "issue" presented in the Petition is important to the Commission since a portion of its activity involves the regulation of advertising (Pet. pp. 16-17). As has been noted above, the Commission itself has already recognized that it now must consider First Amendment rights in reviewing commercial advertising. As also has been shown above, the requirement that the Commission fully consider all alternative remedies before requiring excision is a requirement with which the Commission has been living for 44 years.

The Commission exaggerates the importance of the decision below. The sole issue is whether or not the Commission abused its discretion in requiring excision when appropriate qualifying language was available. Each proceeding before the Commission involving the propriety of excision of advertising material turns upon its own particular facts rather than on a difference of governing law. The decision below was based upon firmly established guidelines and does not present issues of sufficient importance to warrant review by this Court.[11]

10. *Jacob Siegel v. Federal Trade Commission*, 327 U. S. 608 (1946) and *Federal Trade Commission v. Royal Milling Co.*, 288 U. S. 212 (1933).

Couching the supposed importance of this decision in terms of the Commission's ability to carry out its statutory objective to "protect the public" does not add to the supposed importance of the decision. The Court has recently observed that it will not countenance unnecessarily injurious remedial orders even when invoked by the rhetoric of "statutory enforcement" and "public interest." See *Rondeau v. Mosinee Paper Corp.*, 422 U. S. 49, 61 (1975), setting aside an unnecessarily stringent order under the Securities Laws and stating: "the qualities of mercy and practicality have made equity the instrument for nice adjustment and reconciliation between the public interest and private needs . . .".

In summary, Congress has mandated that the courts of appeals assure that administrative remedies stay within reasonable grounds. *Burlington Truck Lines, Inc. v. U. S.*, 371 U. S. 156, 167 (1962):

11. The narrowness of the issues presented by this case, and the consequent inappropriateness of Supreme Court review, should be contrasted with a proposed trade regulation rule upon which hearings are now being held by the Commission. If adopted, the proposed rule would prohibit *per se* the use of all terms in the advertising of over-the-counter drugs, no matter how truthful and non-deceptive, which depart from a uniform lexicon of labeling terminology presently being promulgated by the Food and Drug Administration. 40 Fed. Reg. 52631 (November 11, 1975). Adoption of such a rule would obviously raise substantial First Amendment issues and represent an assertion of Commission authority going well beyond the formulation of a cease-and-desist order adequate to remedy alleged false or misleading advertising. In contrast, review of broad constitutional issues by the Court at this stage of the present litigation is premature and unwarranted.

"[Where t]here are no findings and no analysis . . . to justify the choice made, [there is] no indication of the basis on which the Commission exercised its expert discretion. We are not prepared and the Administrative Procedure Act will not permit us to accept such adjudicatory practice. [citation] Expert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion.'"

The Court of Appeals acted well within the established standards which govern the judicial review of administrative action and its decision in this case does not unduly restrict the Commission's ability carefully to fashion appropriate remedies.

III. The Decision of the Court of Appeals Was Correct.

As has been shown above, the decision of the Court of Appeals is consistent with prior decisions both of this Court and other courts of appeal in holding that the Commission should not issue orders which go further than is reasonably necessary. An excision order issued by the Commission will not be affirmed if a less drastic means, such as requiring the addition of appropriate qualifying language, will accomplish the same result. The Court below correctly applied these principles.

The Commission erred as a matter of law in not properly applying *Jacob Siegel* and *Royal Milling*, and the error is continued in its Petition (Pet. pp. 13-14, n. 10), where it argues that *Jacob Siegel* and *Royal Milling* do not apply to advertising. In *Parker Pen Co. v. Federal Trade Commission*, 159 F. 2d 509 (7th Cir. 1946), the Commission prohibited the appellant from using the slogan "Lifetime Guarantee" or words of similar import in connection

with the sale of its pens unless the appellant would refrain from its requirement that a nominal service charge be paid for repairs. The Seventh Circuit, on the authority of *Jacob Siegel*, held that the order was overbroad. The Court modified the order of the Commission to permit explanatory language that a nominal service charge in a specified amount would be required in connection with repairs under the lifetime guarantee. See also the decisions cited at p. 14 *supra* for other examples of the principle of *Siegel* and *Royal Milling* being applied to advertising.

As the Commission tacitly concedes, Beneficial's instant tax refund loan advertising constitutes a property right [12] which has become an important and integral part of its business operations (A42a). Beneficial originated and extensively used such advertising, invested substantial sums of money therein, obtained copyright protection therefor, and regards its use as a valuable business asset A55a, 84a, 89a-92a).

The Commission contends that advertising is of no value and the government can issue restraints on advertising without affording careful treatment to respondents in proceedings before regulatory agencies. The Commission further contends that once it has undertaken to modify advertising, the courts must abdicate their responsibilities and adhere to governmental decisions to modify

12. The United States Constitution and the Copyright Act enacted pursuant thereto "accord . . . a property status to copyright". Nimmer, *Copyright*, § 3.1 at 6.7 (1963). The principle embodied in the Copyright Act is that "[t]he fruits of an author's labor [are] . . . deserving of the privileges and status of 'property' . . .". *Id.*, at 6.9. As the Court has stated, an unlimited copyright permits its owner to "preclude others from copying his creation for commercial purposes without permission". *Goldstein v. California*, 412 U. S. 546, 555 (1973). Beneficial's instant tax refund loan advertising has thus been accorded the privileges and status of property—property the use of which has become a valuable business asset. Through such usage, the "instant tax refund" loan has become substantially identified with Beneficial's business.

the written word without affording respondents a meaningful review of governmental actions. However, the law is that if a regulatory agency such as the Commission determines that advertising in its present form should not be disseminated further, it is incumbent upon the agency to afford the advertiser an opportunity to correct its advertising to make it both non-deceptive and effective.

The Commission, in arguing that *Federal Trade Commission v. Royal Milling Co.*, 288 U. S. 212 (1933), is inapplicable to advertising (Pet. pp. 13-14, *n.* 10), states without the benefit of citation to any authority, that "prohibiting a particular advertising slogan ordinarily will be far less [harmful] than prohibiting use of a trade name". The views of the commentators are decidedly contrary. They point out the tremendous cost, both in social and economic terms, which may befall advertisers when their advertising materials are despoiled by federal regulatory agencies.[13] Also, this Court has noted ". . . advertising is

13. As Professor Richard Posner of the University of Chicago School of Law has recently stated:

> "[W]here sanctions are severe, the costs of their erroneous imposition tend to be quite high. An administrative agency cannot be expected to be wholly free from bias in favor of imposing sanctions in borderline cases, because its performance is likely to be judged by the number of remedial orders that it issues rather than by the impartiality of its processes. In these borderline cases, it may be inclined to err against respondents. These errors would be a source of heavy social costs if the Commission were empowered to impose punitive sanctions, which tend to be very costly to those on whom they are imposed." *Regulation of Advertising by the F. T. C.* (1973), page 32.

As Yale Law School's Professor Ralph Winter recently stated at the American Enterprise Institute's conference, "Issues in Advertising", June 10, 1976, transcript of proceedings, pages 12-13:

> "[T]he cost of advertising . . . regulation, may easily be understated . . . *that is, a mistake by the agency, the wrong rule, the wrong kind of policy, injures consumers in exactly the*

the *sine qua non* of commercial profits . . .". *Virginia State Board of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U. S. 748 (1976).

Advertising is not a property right of little worth; rather, significant sums are spent in developing effective advertising. Many companies are completely dependent upon advertising for the sale of their products. Seemingly small and insignificant changes in advertising by governmental agencies can render the advertising ineffective and of little value to the advertiser.[14] As the opinion of the Court of Appeals pointed out, there is no difficulty in devising advertising of the instant tax refund loan which is both informative and non-deceptive:

> "Beneficial's everyday loan service can provide to regularly qualified borrowers an Instant Tax Refund Anticipation Loan whether or not the borrower uses our tax service."

or

13. (Cont'd.)

> *same way as fraud. It diminishes consumer satisfaction.*" (Emphasis added.)

Solicitor General Robert Bork expressed his agreement with Professor Winter in that same proceeding, transcript, pages 53-55:

> "We are accustomed, in discussing these matters, to look only at the evil to be cured and not at all the evil inherent in the cure. . . . *[T]here is the cost to consumers of regulatory mistakes and we can be certain that they will occur.*" (Emphasis added.)

14. Modern copy research (research on the actual effect upon readers of advertising messages) has established that even minor variations in the physical characteristics of advertisements may have significant impact upon the effectiveness of such advertisements. *See, e.g.*, Lucas and Britt, *Measuring Advertising Effectiveness* (1963), pages 3-21; *Advertising Performance as a Function of Print Ad Characteristics*, 7 *Journal of Advertising Research*, 20 (June, 1967). *See also*, Howard and Sheth, *The Theory of Buyer Behavior*, 357-366 (1969), stressing that layout, visual contrast, shape, and typeface, as well as other graphic elements, have important "connotative meanings" determinative of consumer attitudes.

"Beneficial's everyday loan service can provide to any regularly qualified borrower an instant loan in anticipation of his tax refund. We call it an Instant Tax Refund Anticipation Loan." (A19a).

There are numerous other examples which could be suggested. Each of these examples clearly states that Beneficial is offering its loan service to regularly qualified borrowers and each clearly states that the service being offered is a loan from Beneficial rather than a refund from the government. To argue that the language conveys the impression that a direct refund from the government is being offered or that persons other than regularly qualified borrowers of Beneficial can make use of the service is to ignore the words themselves. The Commission attempts to denigrate these examples because such forms were suggested by the Court of Appeals rather than by Beneficial (Petition at 8). Again, the Commission has misconstrued the applicable legal principles. The Court of Appeals recognized, as the Commission has not, that the appropriate standard by which to test any excision order is whether or not such order is reasonably related to curing the evil perceived and whether or not a less drastic remedy would suffice. In exemplifying possible permissible forms of advertising, the Court of Appeals merely pointed out to the Commission the fact that a less drastic remedy was available, which remedy the Commission failed fully to consider.

Indeed, the order of the Court of Appeals could have gone further. Under the applicable provisions of the Federal Trade Commission Act, 15 U. S. C. § 45(c), the Court of Appeals could have modified the excision order rather than remand the question of remedy to the Commission for its further consideration. See, *Grove Laboratories v. Federal Trade Commission*, 418 F. 2d 489 (5th Cir. 1969);

Carter Products, Inc. v. Federal Trade Commission, 186 F. 2d 821 (7th Cir. 1951); *Alberty v. Federal Trade Commission*, 186 F. 2d 36 (D. C. Cir. 1950), *cert. denied*, 340 U. S. 818 (1950); *Parker Pen Co. v. Federal Trade Commission*, 159 F. 2d 509 (7th Cir. 1946); *D. D. D. Corp. v. Federal Trade Commission*, 125 F. 2d 679 (7th Cir. 1942).

There is an additional basis on which the decision of the Court of Appeals is demonstrably correct. The Administrative Law Judge decided that an excision order was required on the ground that Beneficial must purge itself of its alleged past misdeeds regarding its advertising and that the excision remedy was an appropriate exercise of the Commission's punitive powers (A133a). The Commission adopted this view (A36a).

In adopting that theory, the Commission erred since proceedings before the Commission are not punitive in nature and its remedies should not be adopted to punish. *Federal Trade Commission v. Gratz*, 253 U. S. 421, 432 (1920) [dissenting opinion of Mr. Justice Brandeis]; accord, *Federal Trade Commission v. Cement Institute*, 333 U. S. 683, 706 (1948) rehearing denied 334 U. S. 839 (1948); *Heater v. Federal Trade Commission*, 503 F. 2d 321, 324-25 (9th Cir. 1974).

Therefore, in view of the satisfactory alternatives to excision, a few of which the Court of Appeals suggested, and in view of the fact that the Commission has no authority to order punitive remedies, the Court of Appeals correctly applied settled principles of decisional law in remanding the question of remedy to the Commission for further consideration.

CONCLUSION.

The decision below does no more than require the Commission to exercise its discretion fully to explore the availability of alternative cease-and-desist provisions which do not go beyond the necessities of the case and do not unduly impinge on rights of protected speech. Whatever serious issues may arise from possible future Commission actions not now before this Court, they are not presented by this case. The remand ordered by the Court of Appeals was clearly correct on the record before it. For these reasons, it is respectfully submitted the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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